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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 MICHAEL ANTHONY HARRIS,
12
13 vs.
14 LARRY SMALL, Warden,
Respondent.

CASE NO. 08cv1229 WQH (POR)
ORDER

15
16 HAYES, Judge:

17 The matter before the Court is the Report and Recommendation filed by Magistrate
18 Judge Louisa S. Porter. (Doc. # 20).

19 **BACKGROUND**

20 On July 2, 2008, Petitioner Michael Anthony Harris, a state prisoner proceeding *pro se*,
21 initiated this action by filing his Petition for Writ of Habeas Corpus in the United States
22 District Court for the Central District of California. (Doc. # 1). Petitioner challenges his
23 conviction for robbery on the grounds that (1) there was insufficient evidence to support his
24 conviction; and (2) the trial court improperly denied his motion for substitute counsel, resulting
25 in ineffective assistance of counsel. *Id.* at 5. On July 9, 2008, the action was transferred to the
26 United States District Court for the Southern District of California. (Doc. # 3). On September
27 4, 2008, Respondent Larry Smalls filed a Motion to Dismiss Petition for Writ of Habeas
28 Corpus. (Doc. # 9). Respondent contended the petition was untimely. (Doc. # 9-1 at 3). On

1 April 14, 2009, the Court denied the Motion to Dismiss, holding that Petitioner was entitled
2 to equitable tolling. (Doc. # 16).

3 On June 9, 2009, Respondent filed an Answer to the Petition. (Doc. # 18). The
4 Memorandum of Points and Authorities in support of Respondent's Answer contends the state
5 courts reasonably denied Petitioner's claim that the evidence was insufficient to support his
6 conviction and Petitioner's claim that the trial court erred in failing to provide substitute
7 counsel. (Doc. # 18-1 at 5, 7-8).

8 On June 30, 2009, Petitioner filed a traverse. (Doc. # 19).

9 On February 19, 2010, the Magistrate Judge issued a Report and Recommendation
10 ("R&R") which recommends that the Petition be denied. (Doc. # 20). The R&R concludes
11 that "the state appellate court reasonably concluded that there was ample evidence to support
12 a rational trier of fact's conclusion that Petitioner committed the robbery." *Id.* at 7. The R&R
13 concludes that the state appellate court's decision properly relied on the evidence offered at
14 trial that a man with the same weight, height, build, and skin tone touched an item at the crime
15 scene subsequently recovered with Petitioner's print on it. *Id.* at 6-7. The R&R addresses the
16 two issues raised by Petitioner's second claim separately. *Id.* at 7 n. 2. First, the R&R
17 concludes that the state appellate court correctly held that the trial court did not commit
18 constitutional error in denying Petitioner's *Marsden* motion for substitute counsel. *Id.* at 8-9;
19 *see also People v. Marsden*, 2 Cal. 3d 118 (1970). Applying *Schell v. Witek*, 218 F.3d 1017,
20 1025 (9th Cir. 2000) (en banc), the R&R concludes the trial court properly addressed the
21 *Marsden* motion for substitute counsel by assigning a different judge to preside over a closed,
22 *ex parte* hearing where the court gave Petitioner an opportunity to explain his concerns with
23 his current counsel and heard testimony from Petitioner's counsel about his view on their
24 disagreements. *Id.* at 9. The R&R concludes this record shows Petitioner's differences with
25 his counsel were "over a matter of trial tactics, which does not mandate granting a motion for
26 substitution of counsel." *Id.* at 10. Second, the R&R concludes that Petitioner has failed to
27 demonstrate that his trial attorney's performance was deficient. *Id.* at 11-12. Although
28 Petitioner contends "his attorney presented no meaningful defense by rejecting pursuit of an

1 alibi defense” after investigating Petitioner’s alibi and concluding it was weak, the R&R
 2 concludes that Petitioner’s trial counsel presented a defense based on the weakness of the
 3 prosecution’s case. *Id.*

4 The R&R informed the parties that any party may file an objection no later than March
 5 22, 2010 and that any reply shall be filed no later than fourteen days after being served with
 6 the objections. *Id.* at 12-13. On March 24, 2010, Petitioner filed a Motion for Enlargement
 7 of Time to Respond to the Report and Recommendations. (Doc. # 22). The Court granted the
 8 motion on March 29, 2010. On April 13, 2010, Petitioner filed his objection to the R&R.
 9 (Doc. # 24). Respondent did not file any objections or response to Petitioner’s objection.

10 In his objection, Petitioner objects to the Magistrate Judge’s conclusion that the state
 11 court’s decision on the sufficiency of the evidence was neither an unreasonable application of
 12 *Jackson v. Virginia*, 443 U.S. 307, 314-318 (1979), nor based on an unreasonable
 13 determination of the facts. (Doc. # 24 at 2). Petitioner contends the Magistrate Judge erred
 14 because the evidence does not permit a rational fact-finder to conclude that he is guilty beyond
 15 a reasonable doubt. *Id.* Petitioner contends the circumstantial evidence against him “at least
 16 equally supports guilt and innocence.” *Id.* Petitioner contends there was no evidence that a
 17 tile recovered from a stolen vehicle with Petitioner’s fingerprint on it was the same tile which
 18 witnesses saw one of the robbers touch. *Id.* at 3-4. Petitioner contends his print is only
 19 evidence that he was a “curious passerby or an accessory after the fact” who encountered the
 20 stolen vehicle, not evidence that he was involved in the robbery. *Id.* at 4.

21 In the event that the Court adopts the conclusion of the R&R and denies the Petition,
 22 Petitioner requests a Certificate of Appealability allowing him to appeal his case pursuant to
 23 *Miller-El v. Cockrell*, 537 U.S. 322 (2003). (Doc. # 24 at 5). Petitioner contends he has made
 24 a sufficient showing that he was denied a constitutional right to merit a Certificate of
 25 Appealability and contends that reasonable jurists could debate whether he is entitled to relief.
 26 *Id.* at 6-8.

27 STANDARD OF REVIEW

28 The duties of the district court in connection with the Report and Recommendation of

1 a Magistrate Judge are set forth in Rule 72(b) of the Federal Rules of Civil Procedure and 28
 2 U.S.C § 636(b). The district judge “must make a de novo determination of those portions of
 3 the report . . . to which objection is made,” and “may accept, reject, or modify, in whole or in
 4 part, the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b). The
 5 district court need not review *de novo* those portions of a Report and Recommendation to
 6 which neither party objects. *Wang v. Masaitis*, 416 F.3d 992, 100 n. 13 (9th Cir. 2005); *United*
 7 *States v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003) (en banc).

8 ANALYSIS

9 Petitioner objected to the Magistrate Judge’s conclusion that the state appellate court’s
 10 determination that sufficient evidence supports his conviction is not contrary to or an
 11 unreasonable application of clearly established federal law. The Court therefore reviews this
 12 portion of the R&R *de novo*.

13 In reviewing a conviction for sufficiency of the evidence, a court must “determine
 14 whether the record evidence could reasonably support a finding of guilt beyond a reasonable
 15 doubt.” *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The reviewing court must “view[]
 16 the evidence in the light most favorable to the verdict.” *Id.* at 319. In federal habeas review
 17 of a state court conviction, the federal court must defer to a state appellate decision denying
 18 relief pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C.
 19 § 2254(d)(1), and may only reverse the state appellate decision if it is “an objectively
 20 unreasonable” application of the standard established in *Jackson*. *See Saruasad v. Porter*, 479
 21 F.3d 671, 677 (9th Cir. 2007).

22 Here, the Court must “look through” the California Supreme Court’s summary denial
 23 of the petition and examine the state appellate court’s decision because it was the last reasoned
 24 decision in Petitioner’s state court appeal. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801-806
 25 (1991).

26 The state appellate court determined that a rational trier of fact could have found
 27 Petitioner guilty beyond a reasonable doubt because

28 [T]he physical evidence of Harris’s fingerprint on the jewelry store tile insert .
 . . supports the verdict. Fingerprints are evidence of identity and ordinarily will

suffice to identify the perpetrator of a crime, and the jury is entitled to draw its own inferences as to how the defendant's prints came to be on the object and when. Harris does not contend the fingerprint evidence in this case was not an accurate match of his fingerprints to the finger on the tile. A man with the same height, weight, build, and skin tone as Harris was seen reaching his gloveless hand into the drawer from which the tile was taken, and the tile (along with other detritus of the robbery) was then abandoned less than an hour later in a stole car in a parking lot many miles from the site of the robbery. . . . [T]here is ample evidence to support a rational trier of fact's conclusion that the most logical explanation was Harris touched the tile during the robbery and then abandoned it shortly thereafter in a car earlier stolen to provide a getaway vehicle.

(Lodgment # 6 at 5-6). The Court concludes that this determination was neither contrary to or an unreasonable application of the standard established by the Supreme Court in *Jackson v. Virginia*. The Magistrate Judge correctly determined that the forensic evidence combined with the circumstantial evidence linking it to the robbery is sufficient to sustain Petitioner's conviction.

Petitioner did not object to the Magistrate Judge's conclusion that his *Marsden* claim and his ineffective assistance of counsel claim should be denied. The Court concludes the Magistrate Judge correctly determined that these claims should be denied.

CERTIFICATE OF APPEALABILITY

A certificate of appealability must be obtained by a petitioner in order to pursue an appeal from a final order in a Section 2254 habeas corpus proceeding. *See* 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."

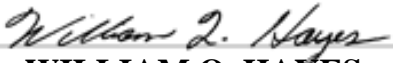
A certificate of appealability should be issued only where the petition presents a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). A certificate should issue where the prisoner shows that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

For the reasons in the order dismissing the petition, the Court concludes that jurists of reason would not find it debatable whether this Court was correct in denying the petition.

1 **CONCLUSION**

2 **IT IS HEREBY ORDERED THAT** (1) the Report and Recommendation (Doc. # 20)
3 is **ADOPTED** in its entirety; and (2) the Petition for a Writ of Habeas Corpus is **DENIED**.

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5 DATED: June 11, 2010

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7 **WILLIAM Q. HAYES**
8 United States District Judge
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